Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of:	)	
	)	
Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment	)	WT Docket No. 17-79
	)	
	)	

COMMENTS OF THE COLORADO COMMUNICATIONS AND UTILITY ALLIANCE, THE RAINIER COMMUNICATIONS COMMISSION, THE CITIES OF SEATTLE AND TACOMA, WASHINGTON, KING COUNTY WASHINGTON, THE JERSEY ACCESS GROUP AND THE COLORADO MUNICIPAL LEAGUE

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June 14, 2017

SUMMARY

The Colorado Communications and Utility Alliance, the Rainier Communications Commission, the Cities of Seattle and Tacoma, Washington, King County, Washington, the Jersey Access Group and the Colorado Municipal League (referred to as the "Local Governments") collectively represent the interests of local governments that are home to approximately ten million people. Our communities are truly diverse, and range from large and dense urban areas to extremely small, remote rural areas, and almost every other kind of community in between. The Local Governments provide their perspective to the Commission from both the east and west coasts, and the Rocky Mountain Region.

The Local Governments, like most of their counterparts around the country, support the deployment of broadband facilities of all kinds. We understand that deployment of wireless broadband networks is a piece of a much larger puzzle, and local governments generally are working hard to balance the many other responsibilities they are obligated to manage with the responsibility of facilitating the deployment of wireless broadband networks in a reasonable manner.

The information provided by these Local Governments in a recent docket[1] indicates that while many local government codes may not, at present, directly address the new and unique issue of siting wireless broadband in public rights-of-way (ROW), communities *have been proactive* in addressing these deployment issues, whether it involves changing local codes, negotiating ROW

[1] *Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies, Mobilitie, LLC Petition for Declaratory Ruling*, WT Docket No. 16-421; Comments: https://ecfsapi.fcc.gov/file/10308895002297/Local%20Government%20Comments%20(WT%20Doc%20%20No%20%2016-421)%20(Small%20Cell%20Proceeding)%20(FINAL)%20(3-8-17).pdf; Reply Comments: https://ecfsapi.fcc.gov/file/104071412112067/Local%20Government%20Reply%20Comments%20(WT%20Doc%20%20No%20%2016-421)%20(Small%20Cell%20Proceeding)%20(FINAL)%20(4-7-17).pdf.

license agreements and processing permit applications. To the extent that wireless companies are seeking permission to locate facilities in the ROW (and many communities are *not* yet seeing this), the regulatory process is evolving and works relatively well. Many local governments have reached out to the wireless communications industry to assist in revisions to local regulations. Some have worked on model documents for deployment licenses and permitting that can be replicated in other communities. In many cases, the industry applicants have willingly stepped back to allow local governments to amend codes to address wireless broadband deployment issues in a collaborative manner. These local and regional activities have been successful at bringing the parties together to gain a better understanding of each other's legitimate interests.

Our information suggests that there is no national problem calling out for a federal solution with respect to local control over the siting of wireless broadband networks in our communities. It is true that the future deployment of 5G networks will require many more sites for wireless facilities. At the same time, there are literally hundreds of thousands of sites for wireless communications facilities that have already been permitted and deployed throughout the country. As an example, sources (including an industry source) claim between 216,000 and 308,000 sites in 2016.[2] This is not to say that siting cannot be improved. In the experience of these Local Governments there are both industry and government entities that occasionally "push the envelope" and whose activities may delay deployment. However, the total number of these "bad actor" activities is a tiny percentage of the total number of applications that have been processed successfully in the United States. There is no widespread national problem that the

[2] http://www.statisticbrain.com/cell-phone-tower-statistics/ (last visited June 10, 2017); https://www.ctia.org/docs/default-source/default-document-library/annual-year-end-2016-top-line-survey-results-final.pdf?sfvrsn=2 (last visited June 10, 2017).

Commission needs to step in and fix.

The Local Governments believe the Commission can play a positive role as a facilitator, although it must make a commitment to treat all parties as equals, and respect the longstanding efforts of localities to promote broadband deployment. The Commission must take great care not to pursue policies that pick winners and losers, as it appears to have done from a reading of the NPRM and NOI in this Docket. Further, the Local Governments believe that the Commission has limited legal authority to take regulatory action that limits or preempts local land use or ROW authority in connection with siting issues, and we support the arguments about the scope of that legal authority made by our national associations and other local government entities in their Comments in this Docket.

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These Comments are filed by the Colorado Communications and Utility Alliance ("CCUA"), the Rainier Communications Commission ("RCC"), the cities of Tacoma and Seattle, Washington ("Tacoma" and "Seattle"), King County, Washington ("King County"), the Jersey Access Group ("JAG") and the Colorado Municipal League ("CML") (collectively referred to as "the Local Governments"), in response to the Commission's Notice of Proposed Rulemaking and Notice of Inquiry released April 21, 2017, in the above-entitled proceeding.[3]

I. INTRODUCTION

A. Background on the Local Governments.

CCUA was formed as a Colorado non-profit corporation in 2012, and is the successor entity to the Greater Metro Telecommunications Consortium. Its members have been working together since 1992[4] to protect the interests of their communities in all matters related to local

[3] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, WT Docket No. 17-79 (FCC 17-38) (NPRM and NOI).

[4] The current members of CCUA are Adams County, Adams 12 Five Star Schools, Arapahoe County, Arvada, Aurora, Boulder, Brighton, Broomfield, Castle Pines, Castle Rock, Centennial, Cherry Hills Village, Columbine Valley, Commerce City, Dacono, Delta, Denver, Douglas County, Durango, Edgewater, Englewood, Erie, Federal

telecommunications issues. The CCUA undertakes education and advocacy in areas such as telecommunications law and policy, cable franchising and regulation, zoning of wireless communications facilities, broadband network deployment, public safety communications, rights-of-way management, and operation of government access channels. The CCUA is the Colorado chapter of the National Association of Telecommunications Officers and Advisors ("NATOA") and an affiliate of the Colorado Municipal League.

RCC is an intergovernmental entity formed under Washington law, comprised of Pierce County and 9 municipalities located within Pierce County.[5] Mount Rainier is located in the eastern part of Pierce County. To the west, Pierce County includes the Port of Tacoma, and the Narrows Bridge spanning Puget Sound, connecting Pierce County residents on the Gig Harbor Peninsula. RCC jurisdictions comprise an area of approximately 1,806 square miles, and represent a population of approximately 933,000 people. The RCC has existed since 1992 as an advisory body on matters relating to telecommunication for Pierce County and most of the cities and towns in Pierce County.

The City of Seattle, Washington has approximately 652,400 inhabitants on 84 square miles. A number of Seattle's distinct neighborhoods are made up of single-family residential homes. However, much of the population is concentrated in dense urban neighborhoods made up of apartment buildings and condominiums in the downtown area, around the University of Washington, and in other urban centers. Seattle's median annual household income is

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Heights, Fort Collins, Frederick, Glendale, Golden, Grand Junction, Greenwood Village, Lafayette, Lakewood, Littleton, Lone Tree, Longmont, Louisville, Loveland, Montrose, Northglenn, Paonia, Parker, Sheridan, Southwest Colorado Council of Governments (SWCCOG), Thornton, Westminster, and Wheat Ridge.

[5] The members of RCC are Pierce County and the Cities of Sumner, Orting, Puyallup, Fife, DuPont, University Place, Ruston, Steilacoom and Carbonado.

approximately $64,129. Seattle has several lakes and borders two large bodies of water: Puget Sound on the west and Lake Washington on the east. The total water body area within Seattle is 3.42 square miles. Seattle owns its municipal electric, sewer, and water utilities. Seattle has several departments involved in the granting of permits and access to the rights-of-way that are referenced in these Comments. They include: Seattle City Light ("SCL"), Seattle Department of Transportation ("SDOT"), Seattle Public Utilities ("SPU"), the Department of Planning and Development and ("DPD") and the Department of Finance and Administrative Services ("FAS").

The City of Tacoma, Washington is located on the south end of Puget Sound, and is home to the sixth largest container port in North America. Named one of America's most livable communities, Tacoma is comprised of approximately 49 square miles and has a population of over 200,000 people.

Located on Puget Sound in Washington State, and covering 2,134 square miles, King County is nearly twice as large as the average county in the United States. With more than 2 million people, it also ranks as the 14th most populous county in the nation.

The Jersey Access Group (JAG) is a professional advisory organization of New Jersey local governments and school districts that informs, educates, and recommends in the areas of technology, legislation, and regulation that shape and direct the use of multi-communication platforms for content creators and distributors on behalf of municipalities, educational institutions, and other public media facilities. JAG was formed in March of 2000, and has played a dominant role in the development of New Jersey's public, educational, and government (PEG) television stations. As the New Jersey state chapter of NATOA and an affiliate of the New Jersey State League of Municipalities, JAG also educates and advocates on behalf of its members on

broadband and communications issues related to consumer protection, broadband access and funding, public safety spectrum, public rights-of-way management and policies and local government networks.

Founded in 1923, the Colorado Municipal League ("CML") is a nonprofit, nonpartisan organization providing services and resources to assist municipal officials in managing their governments and serving the cities and towns of Colorado. CML is the leading nonpartisan resource for municipal officials in Colorado, providing high quality resources and services that empower municipal governments to sustain strong, healthy, and vibrant cities and towns. CML represents Colorado cities and towns collectively through its advocacy, membership services, training, and research efforts.

B. Concern About the NPRM and NOI's Underlying Premise.

The Local Governments are concerned about the underlying premise of the NPRM and NOI, namely, that local and state government rights-of-way ("ROW") practices, wireless facilities siting regulations and fees charged for the use of the ROW play a significant and sometimes negative role in deployment of broadband facilities. There may in fact be some limited local government practices that negatively impact deployment. Likewise, there may in fact be some limited industry practices that negatively impact deployment. Reading through the NPRM and NOI, one finds dozens of paragraphs that reference alleged or potential negative practices of local government that the Commission should examine, as it decides taking action to limit these activities. There is only one paragraph in the NPRM and NOI where the Commission

acknowledges that there may be negative industry practices that impact deployment.[6] While an NPRM and NOI are the beginning of a process that may lead to Commission action, it cannot be denied that the NPRM and NOI in this Docket has set a table that is steeply tilted against the legitimate and longstanding principals of local control.

In addition, there is a complete lack of recognition of the public health and safety benefits of the local regulatory process. Local governments do not regulate in this area to cause problems for wireless deployment. Regulations lead to safe pathways for children to walk or bike to school and parks. It leads to control of traffic flows through particularly busy times of the day. It protects property adjacent to work areas, both public and private, and requires that entities undertaking that work do so in a responsible manner. And it also serves to strike a balance between promoting network deployment with all other critically important community goals and interests. There seems to be a belief in Washington, D.C. that local government regulation simply results in furthering a "not in my backyard" mentality. In the vast majority of cases, that bias is simply untrue. There is a significant difference between eliminating local authority so as to allow towers of any height in any part of the rights-of-way, regardless of the impact on property owners and property values, versus exercising local authority to, for example, mandate height limits consistent with local zoning regulations for all structures in the neighborhood, and require placement of vertical structures closer to lot lines where they will not impact sight lines from the front door of one's home. These are inherently local decisions. The NPRM and NOI do not seem to recognize that a wider array of community benefits may be lost, should the Commission create preemptory rules to benefit one industry, at the expense of all other community interests.

[6] NPRM and NOI, at ¶7.

II. RESPONSES TO NPRM

A. Introduction.

The Commission has asked many questions related to the siting of wireless facilities and the State, local and Tribal oversight and authority to address those issues in their communities. Many of the questions raised are quite similar to the questions raised in the Mobilitie petition and Public Notice.[7] The Local Governments filed Comments and Reply Comments in that docket, and we encourage the Commission to review those pleadings in connection with this Docket. Our Comments and Reply Comments there are attached as Exhibits A and B here. The time provided to respond to the NPRM and NOI does not allow the Local Governments to respond to every issue raised in the Docket related to wireless broadband deployment and local control, so we address here the issues we deem most critical.

B. Deemed Granted Remedy Issues.

Noting that Section 6409(a) of the Spectrum Act led to shot clock rules,[8] the Commission now asks whether Section 332(c)(7)(A)-(B) of the Telecommunications Act of 1996 (the Act) provides the authority for new shot clock rules.[9] Further, the Commission indicates that it intends to establish a "deemed granted" remedy for applications that relate to wireless facilities that are not covered by the mandatory collocations that Congress referred to in the Spectrum Act.[10] Yet, "[A]llegations that a state or local government has acted inconsistently with Section 332(c)(7) are

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[7] *Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies, Mobilitie Petition for Declaratory Ruling*, WT Doc. 16-421; Petition: https://ecfsapi.fcc.gov/file/122306218885/mobilitie.pdf; Public Notice: https://ecfsapi.fcc.gov/file/12222748726513/DA-16-1427A1.pdf.

[8] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156, § 6409(a) (2012) (Spectrum Act), *codified at* 47 U.S.C. § 1455(a).

[9] NPRM and NOI ¶5.

[10] NPRM and NOI ¶8.

to be resolved ***exclusively by the courts*** (with the exception of cases involving regulation based on the health effects of RF emissions, which can be resolved by the courts or the Commission). Thus, other than in RF emissions cases, ***the Commission's role in Section 332(c)(7) issues is primarily one of information and facilitation***." (Emphasis added) The foregoing statement, taken directly from the Commission's website, has been the Commission's interpretation of Section 332 since the passage of the Act in 1996, through seven Commission chairs, from both political parties.[11] How can that law mean something else today?

The Commission has previously adopted a 90-day shot clock for collocation applications and a 150-day shot clock for other applications that are not mandatory collocations covered by the Spectrum Act and the Commission's 6409 rules.[12] Unlike the Spectrum Act, where Congress *specifically* preempted State and local laws related to a limited class of collocations, there is no authority given to the Commission under Section 332 for adoption of a deemed granted remedy.

To be clear, the "granting" of a land use application or a right of way permit is an inherently local or State decision. The federal government is not a zoning authority. It has no authority to control the terms of access and determine conditions applicable to construction in local rights of way. Even at the federal level, the Commission has no legal authority to grant authority to property owned by other federal agencies. Therefore, for the Commission to insert itself as the final decision maker over local or State land use and/or permitting issues, there must

[11] https://www.fcc.gov/general/tower-and-antenna-siting (last visited June 10, 2017)
[12] *2009 Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14009.

be direct authority granted by Congress to preempt these traditional areas of local and State authority or an ambiguity in the statute that the Commission has authority to interpret.[13]

The three options that the NPRM suggests provide legal authority to adopt a deemed granted remedy[14] will not withstand judicial scrutiny.

1. **Irrebuttable Presumption**: The 2009 Shot Clock Declaratory Ruling created the presumption that shot clock deadlines are reasonable.[15] The Commission suggests it can convert the rebuttable presumption in the shot clock rules into an irrebuttable presumption, and if a State or local government fails to act within the deadline it would result in the application being deemed granted.[16] However, this is not the case of interpreting ambiguous provisions of a federal statute, as was the case when the 2009 shot clock rules were adopted. The *City of Arlington* case does not support the Commission's suggestion here.[17] While the decision in that case is clear – the Commission has authority to adopt rules interpreting ambiguous statutory language – the issue in that case was the meaning of "a reasonable period of time." There is no ambiguity in the statute about what happens if a jurisdiction does not act within a reasonable period of time – the party impact by that failure to act has a specific judicial remedy.[18] Without specific authority from Congress permitting the Commission to step in, create its own remedies, and become the final decision maker in local and State land use and permitting decisions, the Commission may not adopt a deemed granted remedy for these kinds of applications.

[13] *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Wyeth v. Levine*, 555 U.S. 555 (2009).
[14] NPRM and NOI ¶9.
[15] *2009 Shot Clock Declaratory Ruling*, 24 FCC Rcd at 14009, para. 38.
[16] NPRM and NOI at ¶10.
[17] *City of Arlington* v. FCC, 133 S. Ct. 1863 (2013).
[18] 47 U.S.C. § 332(c)(7)(B)(v).

The fact that the Fourth Circuit affirmed the 2014 Infrastructure Order and held that "deemed granted" remedy for the Spectrum Act is permissible under the Tenth Amendment,[19] is not relevant to this discussion. The Spectrum Act contained direct language of Congressional preemption, and the Commission simply interpreted under what circumstances that Congressional preemption would occur. There is no express preemption language in Section 332 that is analogous to the statutory authority supporting the Infrastructure Order which would support authority for a deemed granted remedy here.[20]

2. **Lapse of State and Local Authority:** The Commission also claims, without legal authority, that based on Section 332(c)(7)(A), if a locality fails to meet its obligations under Section 332(c)(7)(B)(ii), to act within a reasonable period of time, the State or local government would default its authority on the applications.[21] As noted above, there is a statutory obligation to act within a reasonable period of time and the Commission has determined what constitutes a reasonable period of time. Failure to act allows an applicant to seek a judicial remedy.[22] Even if the Commission could somehow identify what it means for another level of government to "default its authority," the statute already provides a remedy. There is no authorization for the Commission to step in and make a land use or permit decision.

3. **Preemption Rule**: The Commission asserts in the NPRM that Section 201(b) and 303(c) authorize the Commission to adopt rules or issue orders to carry out the substantive

[19] *Montgomery County v. FCC*, 811 F.3d 121, 128 (4th Cir. 2015); NPRM and NOI ¶13.
[20] *Id*.
[21] NPRM and NOI ¶14
[22] *See*, footnote 19, *supra*.

provisions of the Communications Act.[23] Specifically, Section 303(r) directs the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, ***not inconsistent with law***, as may be necessary to carry out the provisions of this Act" (emphasis added). The Commission cannot preempt without clear direction from Congress or unless there is an ambiguous provision in the statute that needs to be interpreted. Under a *Chevron* deference analysis, any attempt to do so would be "inconsistent with law."[24] Here, however, the statute clearly provides a judicial remedy. As noted above, there is no authority for the Commission to insert itself as a zoning and permitting decision maker.

The Commission should carefully consider the unintended consequences of a broad deemed granted remedy, because from a policy standpoint, that remedy would be a terrible decision and result in actions contrary to the intent of the Commission and most State and local governments. A shot clock with a deemed granted essentially gives the wireless industry a special set of unique rules that will require State and local government to move them to the front of the application line. Some of our communities only have one or two planners. Even the larger communities are often in an understaffed position. When an application is made, in the vast majority of cases, the final action occurs within the existing shot clock time periods. But each case is fact specific. If an application comes in while staff is working on a Wal-Mart application, and new housing development, and a proposed highway project, under the existing shot clock rules, local governments usually work well with the industry applicant and mutually agree that a

[23] 47 U.S.C. §§ 201(b) ("The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."), 303(r) (directing the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act"); NPRM and NOI ¶15.

[24] *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc*., 467 U. S. 837 (1984).

reasonable amount of additional time can be taken to fairly balance the facts of the situation. With a deemed granted remedy looming, local governments will be encouraged to take an application, where sufficient time is not available to evaluate it, and schedule it for a formal decision of denial, simply to avoid the deemed granted federal remedy. The deemed granted remedy, even if the Commission had the authority to adopt it, would slow deployment, not speed it up.

4. **Deemed Granted Remedy under Sections 253 and 332 (c)(7)**: Neither Section 253 nor Section 332 (c)(7), standing alone or in conjunction with one another, gives the Commission the authority to enforce a deemed granted remedy. As noted in our more detailed discussion about the interaction between, and scope of authority within, Sections 253 and Section 332(c)(7), the Commission does not have the authority to adopt a deemed granted remedy either under the specific, unambiguous language of these sections, or alternatively, under any interpretation of ambiguous statutory language, although we believe none exists.[25]

C. Reasonable Period of Time to Act on Applications.

Noting that in 2009 the Commission decided the reasonable time period under Section 332(c)(7)(B)(ii) was 90 days for collocation applications and that 150 days is reasonable time for any other application to place, construct, or modify wireless facilities,[26] the Commission now suggests it should change the timeframe from 90 to 60 days.[27] Further, the Commission asks whether there should there be different presumptively reasonable time frames for narrowly

[25] *See*, Section III A, *infra*.
[26] *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994, 14004, 14012-13, paras. 32, 45-48 (2009) (*2009 Shot Clock Declaratory Ruling*), *aff'd*, *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff'd*, 133 S. Ct. 1863 (2013); NPRM and NOI ¶17.
[27] NPRM and NOI ¶18.

defined classes, such as new structures of 50 feet or less, between 50 and 200 feet, and taller than 200 feet. The Commission also raises questions about whether distinctions should be made for new structures in or near major utility or transportation rights of way, deployments in residential, commercial, or industrial areas, small cell/DAS facilities, and "batch" applications of multiple deployments by a single provider.[28]

We encourage the Commission not to tinker with the reasonable time limits in the shot clock rules for three reasons. First, the shot clock rules have worked reasonably well. During the NPRM that led to those rules, many government commenters, including some of the Local Governments represented here, advocated that there was no need for rules because the vast majority of local governments act within reasonable periods of time.[29] While there are always bad actors that cause problems in the application process – sometimes local governments and sometimes industry applicants – most of the time the process works well and there was no need for federal intervention. While we continue to believe that the 2009 shot clock rules were not necessary, we note there has not been much litigation over violations of those rules and thousands of applications have been approved since their adoption.

Second, the Commission should not aspire to become the national zoning authority, and it is clear that in proposing different standards for facilities of different heights, the Commission does not recognize all of the other land use issues that naturally flow from that kind of categorization. For example, if the Commission considers a different shot clock to address

[28] *Id.*

[29] *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*; WT Docket No. 08-165; Comments: https://ecfsapi.fcc.gov/file/6520172718.pdf; Reply Comments: https://ecfsapi.fcc.gov/file/6520175609.pdf.

different structure heights, it will also need to consider the zoning district and the property classifications in which the application is sought. A 200-foot tower in a heavy industrial district may be acceptable as a use by right; in a residential district, it would require more extensive examination. There may be a separate level of review and scrutiny in a commercial retail zone, compared to a mixed-use residential/office/retail zone. Local officials are trained to work in these areas and have years of experience in doing so. The Commission does not possess the expertise or ability to evaluate sub-categories of land use designations that would need to be considered in developing the timing in which actions must be taken for facilities in each of these areas. It is overly simplistic, and contrary to good planning practices to consider only the height or size of a facility in making these decisions.

Third, many state legislatures have adopted or are considering state laws creating siting rules, including shot clocks, for deployments in their states. While these statutes create unified rules within the state, they necessarily differ state to state. After each of these state laws are passed, local government incur time and expense to modify local codes in order to comply with the new state mandates. Given the hundreds, if not thousands of localities that have been updating their codes to comply with new state laws, it would be burdensome and inappropriate for the Commission to impose new costs and expense on localities to change their codes yet again, to accommodate new and potentially conflicting federal rules. In addition, it is not likely that the Commission has the authority to preempt these state laws, especially before giving the states enough time to determine if their new laws are effective.

D. Pre-Application Issues.

The Commission notes that many land use codes provide for pre-application meetings, and suggests that these meetings should impact the application of the shot clocks.[30] These pre-application meetings occur in connection with many different land use matters, and are not in any way limited to broadband infrastructure. The purpose of these meetings is to give prospective applicants an opportunity to discuss code and regulatory provisions with local government staff, and gain a better understanding of the process that will be followed, in order to increase the probability that once an application is filed, it can proceed smoothly to final decision.

Sometimes a simple confirmation in a pre-application meeting that drawings need to be submitted on 24" by 36" sheets of paper as opposed to 18" by 24" (which might be the requirement in another jurisdiction) will save time after the application is made by avoiding initial rejection due to submission of incorrectly sized documents. The Commission should understand that these pre-application meetings serve a valuable purpose prior to a formal application being submitted. At times applications are filed shortly after these meetings and at times a prospective applicant may take months after a pre-application meeting before it files its formal application. The Commission should not rule that shot clock time periods commence ***before an application is even filed***. Such a rule would essentially start the time period to act on an application, when there is no application to consider.

[30] NPRM and NOI ¶20.

III. RESPONSES TO NOI

A. Relationship Between Sections 253 and 332(c)(7).

The Commission asks for comment on the required balance between Congress's "intent to streamline regulations for broadband facilities under Sections 253 and 322(c)(7) of the Telecommunications Act while balancing the long-standing role that State and local authorities play with respect to land-use decisions."[31] While it is arguably the intent of Congress in Sections 253 and 332(c)(7) to ensure comparable treatment of entities seeking access to rights of way, and ensuring that local regulations do not prohibit or have the effect of prohibiting the provision of service, it is a misreading of the statute to claim that the language of these two sections display a Congressional intent to "streamline regulations."

Section 253(a) states that "no State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of an entity to provide any interstate or intrastate telecommunications service."[32] Given the Commission's efforts to reclassify broadband service as a Title I service, and the plain language of Section 253(a) which refers only to "telecommunications service," it is clear that Section 253(a) does not even apply to wireless broadband infrastructure. Wireless broadband service is not (unless it is used as a substitute for land line provider of last resort service), according to the Commission, and according to many states that have deregulated broadband services, a Title II telecommunications service.[33] Section 332(c)(7) generally preserves State and local governments' "authority . . . over

[31] NPRM and NOI ¶87.
[32] 47 U.S.C. § 253(a).
[33] *In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-5, ¶ 29.

decisions regarding the placement, construction, and modification of personal wireless service facilities,"[34] and create limited exceptions for federal preemption of that State and local authority.

The Commission asks whether there is a reason to conclude that the substantive obligations of the two Sections differ, and if so, in what way?[35] As noted above, Section 253, appearing in Title II of the Communications Act, by its own terms applies to "telecommunications services." The wireless broadband services that are the subject of this Docket are not, according to the Commission, telecommunications services. In addition, many applicants for rights of way access of not providers of any kind of service – they are simply infrastructure owners, that seek low or no cost access to public property in order to deploy vertical infrastructure to lease to third parties. While they may own wireless facilities and therefore be covered under Section 332 (c)(7), they are not service providers and Section 253 has no application to these entities. Therefore, the answer to the Commission's question as to whether a locality exceeding jurisdiction over access to rights of way by denying a wireless facilities application[36] violates both sections of the statute is 'no,' because the wireless facilities application does not relate to Title II services and Section 253 does not apply.

In addition to the foregoing, the Local Governments here are familiar with the interpretation of these issues promulgated by the League of Arizona Cities and Towns, the League of California Cities and the League of Oregon Cities in their Comments in this Docket, and we commend that position to the Commission.

[34] 47 U.S.C. § 332(c)(7)(A).
[35] [35] NPRM and NOI ¶89.
[36] *Id*.

B. Prohibit or Have the Effect of Prohibiting.

The Commission notes that the courts have not been consistent with how they interpret Sections 253(a) and 332(c)(7).[37] The Local Governments strongly believe that an applicant must show direct and specific evidence that a local regulation has the effect of prohibiting service, before it violates the Act. We commend the Commission to the positions taken by the New York City Department of Technology and Telecommunications in the letter from General Counsel Michael Pastor in WT Docket No. 17-79, filed April 12, 2017.[38] To simply make a theoretical showing that a regulation may, under some potential set of facts that may or may not ever occur, have the effect of prohibiting service, obliterates the Congressional directive in Section 332(c)(7) preserving most State and local land use authority.

C. Aesthetic Considerations.

The Commission asks whether it should provide more specific guidance on how to distinguish legitimate denials based on aesthetic impacts and mere "generalized concerns."[39] For similar reasons as noted above about the Commission being ill-equipped to serve as a national zoning board, the answer is 'no.' Aesthetic concerns often relate to how a potential site impacts view corridors. The view corridor for a wireless site on a seldom traveled, basically flat two-lane road that has a view of the Jersey shore may be evaluated in a different way than the view corridor in mountainous terrain of a scenic viewing area for Mt. Rainier or a popular wildlife habitat viewing area in Estes Park, Colorado outside of Rocky Mountain National Park. And none of those view corridors may be addressed similarly to the views within the Twin Towers Memorial

[37] NPRM and NOI ¶90.
[38] *Id*.
[39] NPRM and NOI ¶92.

in New York City or Pike's Place Market in Seattle. It is simply unreasonable to believe that the Commission can come up with a one-size-fits all rule that would dictate the only federally-approved way that localities can address aesthetic concerns when structures are proposed within their communities.

The Local Governments do have a suggestion for the Commission, if it believes that it should make these kinds of dictates to other governmental entities regarding aesthetic issues. The Commission should first attempt to impose its judgment in this area first on other federal landowners. After developing rules addressing how to deal with aesthetic concerns in connection with siting wireless facilities, the Commission should seek consensus on such a singular approach from agencies likes the Department of the Interior and National Parks Service, the Bureau of Land Management, the Department of Transportation, the Department of Energy, and the Department of Housing and Urban Development. Until a Commission framework is agreed to by these federal agencies, and there has been a reasonable period of time in which to evaluate its effectiveness, the Commission should refrain from making this kind of determination for over 36,000 units of local government and each of the fifty states.

D. Fees.

With respect to whether wireless siting applications pay fees comparable to those paid by other parties for similar applications,[40] the Local Governments can say unequivocally, 'yes' – except in the instances where state laws require local taxpayers to subsidize broadband companies using public rights of way, and allow them to pay ***less*** than what is paid by other parties.

[40]NPRM and NOI ¶93.

Application fees are based upon recovery of costs incurred by localities. These fees usually estimate the staff time involved in addressing an application, and can include time for planning review, public works review, outside experts, drainage studies, traffic studies, parking analysis, etc. Obviously, an application for sites in the rights of way will not involve parking, so in that case, a wireless applicant will pay less than the applicant for a shopping center approval. Depending upon the site, a wireless applicant may or may not need to address costs of a drainage evaluation by an expert. Similarly, a housing development will not need to provide a report from a radio frequency engineer indicating that the project will comply with federal RF emission standards. However, the fees in each case are tied to the costs of review and evaluation.

Some state laws, while recognizing that in other kinds of applications the local government is entitled to charge fees that provide full cost recovery, specifically give a subsidy to broadband providers and restrict local governments to "less than full cost recovery."[41] The questions in the NOI presuppose that local government fees for wireless site applications and rights of way access are always higher than fees imposed on other business in other types of applications. Here again, the Commission demonstrates an assumption that local government is a bad actor negatively impacting deployment, when in fact, the industry has already won for itself special, lower cost treatment from state legislatures. Instead of assuming local governments are the problem, the Commission might study whether there is more deployment and more competition for broadband service in Colorado as a result of the state grant of these special subsidies to one industry in 1996. When compared to other states without such limitations, the

[41] Colo. Rev. Stat. 38-5.5-101, et. seq. *See also, Plains Coop. v. Washington Bd. of County Comm'rs*, 226 P.3d 1189 (Colo. App. 2009).

findings would be that there is no measurable additional broadband or more competition due to these special rules for the broadband industry.

E. Recurring Fees on Other Publically Owned Land.

The Commission seeks comment on restrictions imposed by State and local governments on siting wireless facilities on publicly owned land that is not part of the rights of way.[42] It should avoid intrusion into this area. Local and State government has for years had the ability to determine whether to make public property available for lease, and to freely negotiate the value of that property, just as private property owners may do. Any attempt to restrict that authority would be in improper taking of state and local property by the federal government without compensation, in violation of the Fifth Amendment.[43]

Many localities, like Westminster, Colorado, choose to lease property at some of its fire stations for towers to house antennas and related equipment for the provision of wireless services. The Commission has no authority to tell the City what it can charge any more than it can direct the City to make all of its fire stations available for these structures. Similarly, in Breckenridge, Colorado, Comcast holds a franchise to provide cable services and pays a 5% franchise fee – the maximum amount allowable under federal law. In addition, Comcast leases land from the Town for its headend and negotiates commercially appropriate terms for that lease in an arm's length transaction. The Commission cannot tell a town whether to lease property for a cable headend and the lease rates to be charged, and it cannot direct a town whether and how to lease property for siting wireless facilities. In this regard, the Commission's authority is no different than its

[42] NPRM and NOI ¶94.
[43] *Arkansas Game & Fish Commission v. United States of America*, 133 S. Ct. 511 (2013); U.S. CONST. amend. V.

authority to direct private property owners to lease their property to wireless facilities owners at Commission-set fees. Such a directive might speed deployment of wireless broadband networks. There is simply no legal authority for the Commission to engage in these practices.

F. Regulatory versus Proprietary Capacity.

Noting that in the 2014 Infrastructure Order, the Commission opined that the Spectrum Act and rules apply to localities' actions in their capacities as land-use regulators, but not when acting as managers in their proprietary roles,[44] it now asks whether Sections 253(a) and 332(c)(7) impact localities in their proprietary roles, and whether to reaffirm or modify that finding in the 2014 Infrastructure Order. It should not.

A government is acting in its regulatory capacity when it is imposing requirements that are applicable to all similarly situated entities. Entities that want to build in a community are all subject to local zoning. Entities working in the rights of way that need to excavate in the streets are all subject to requirements imposing standards of repair and warranties, insurance, bonds, etc. When government owns property however, the decision to sell, lease, license or grant other possessory rights in that government property is (barring specifically authorized federal preemption under established legal criteria, or state preemption of a state's political subdivisions) a purely local decision. Just as the lease of a private parcel might have been concluded for a fair market price of $1500/month in 2000, a similar property today may be worth $2500/month. Publicly owned lands are no different and the Commission lacks the legal authority to insert itself into these transactions.

[44] NPRM and NOI ¶96, citing *2014 Infrastructure Order*, 29 FCC Rcd at 12964-65, paras. 239-40.

With respect to how the Commission should draw a line between the two in the context of properties such as rights of ways, government-owned lampposts or utility conduits, we again suggest that the Commission first work through these issues with federal property owners. Would the Commission dictate to the National Parks Service what it must do in these circumstances? We reiterate the suggestion we made in Exhibits A and B, and that the Commission's Intergovernmental Advisory Committee made in its 2016 report on wireless facilities siting. Educational efforts from the Commission, and collaboration with all affected parties in a manner that respects the legitimate interests of all parties, is the most appropriate legal and policy avenue for Commission action.

G. Unreasonable Discrimination.

The Commission suggests that there may be State or local regulations that target telecom-related deployment more than non-telecom deployments.[45] Rather than address this question in a balanced manner, the Commission proceeds to assume that local regulations are a problem, and asks to what extent localities seek to restrict the deployment of utility or communications facilities above ground and attempt to relocate electric, wireline telephone, and other utility lines in the area to underground conduits.[46] It should be noted first that state laws create unreasonable discrimination by providing broadband companies ***easier access*** to local rights of way,[47] by restricting what local governments can charge while in some cases maintaining for states the rights to impose what charges the state determines,[48] and granting "use by right" status to wireless

[45] NPRM and NOI ¶97.
[46] NPRM and NOI ¶98
[47] Colo. Rev. Stat. 38-5.5.101, et seq.; RCW 35-99; N.J.S.A. 54:30A-124.
[48] Colo. Rev. Stat. 38-5.5-101.

broadband facilities in all zoning districts – a land use privilege not afforded any other property owner.[49] Rather than assuming that the wireless industry is being treated worse by local governments than other property owners, the Commission should take a careful look at these and numerous other state laws that give the wireless industry special privileges not afforded other property owners. The fact that the Commission remains concerned that broadband deployment is not occurring quickly enough (as do the Local Governments) suggests that more subsidies and special rules for the industry is not going to solve that problem.

Finally, with respect to undergrounding, this is another area of traditional State and local control. Good planning principles dictate that in new developments and redevelopments utility infrastructure should be placed underground. The only above ground facilities are usually street lights and traffic signals. In effect, wireless broadband facilities in the rights of way, to the extent new, stand-alone poles are required, runs 180 degrees contrary to good planning principles.

The Local Governments recognize that a balance needs to be struck, and indeed, many of these Local Governments have amended their codes or are in the process of amending their codes, to allow for attachments to existing infrastructure and where appropriate, placement of new, stand-alone poles to house wireless infrastructure. At the same time, whenever a community determines it is appropriate to underground older, unsightly utility poles and wires, it should have the continued ability to do so without federal intrusion. In these cases, localities work with the wireless industry to find alternatives. There is no evidence of a widespread national problem suggesting that local undergrounding policies have had or will have a significant negative impact

[49] Colorado House Bill 17-1193, Approved April 18, 2017, Section 4, amending Colo. Rev. Stat. 29-27-404 by adding a new subsection (3).

on the deployment of wireless networks. Further, in response to the question whether the Communications Act applies to undergrounding,[50] we would suggest that it does not. This is a completely separate area of local authority and intrusion into this area by the Commission is not authorized by the Title 47.

IV. CONCLUSION

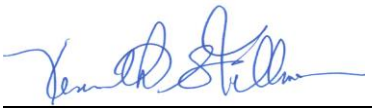
We encourage the Commission to carefully review Exhibits A and B to these Comments. We encourage the Commission to follow the recommendations of its Intergovernmental Advisory Committee, as described in the July 12, 2016 Report on Siting Wireless Communications Facilities.[51] We urge the Commission to tilt the playing field upon which this debate is occurring back to a more level, balanced discussion between the legitimate rights and interests of all interested parties. We ask the Commission to recognize the clear remedies in Section 332 (c)(7), which do not allow the Commission to legislate new remedies not authorized by Congress. Finally, we thank the Commission for considering all of our positions asserted in this Docket.

[50] NPRM and NOI ¶98
[51] https://transition.fcc.gov/statelocal/IAC-Report-Wireless-Tower-siting.pdf

Respectfully submitted this 14th day of June, 2017.

THE COLORADO COMMUNICATIONS AND UTILITY ALLIANCE, THE RAINIER COMMUNICATIONS COMMISSION, THE CITIES OF TACOMA AND SEATTLE, WASHINGTON, KING COUNTY, WASHINGTON, THE JERSEY ACCESS GROUP AND THE COLORADO MUNICIPAL LEAGUE

Kissinger & Fellman, P.C.

By: 

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